No. 79-395

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HAZEL MORRISON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether dismissal of an indictment with prejudice is an appropriate sanction for law enforcement officers' misconduct that did not injure respondent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–11a) is reported at 602 F.2d 529.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a–13a) was entered on May 10, 1979. A petition for rehearing was denied on July 10, 1979 (Pet. App. 14a–25a). On July 30, 1979, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 8, 1979. The petition was filed on September 7, 1979, and was granted on June 30, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

STATEMENT

In an indictment filed in June 1978 in the United States District Court for the Eastern District of Pennsylvania, respondent was charged with two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Under an agreement with the government, she pleaded guilty to one count but reserved the right to appeal the district court's denial of her motion to dismiss the indictment. She was sentenced to five

years' imprisonment, to be followed by a three-year special parole term.

Before entering her plea, respondent moved to dismiss the indictment on the ground that agents of the Drug Enforcement Administration had improperly visited and interviewed her after her indictment in the absence of defense counsel. She alleged that this conduct violated her Sixth Amendment right to the effective assistance of counsel and deprived her of a fair trial. Following an evidentiary hearing, the district court denied the motion.

1. The evidence presented at the hearing showed that on the afternoon of August 23, 1978, DEA agents Stephen Hopson and James Bradley visited respondent at her residence in an effort to obtain her cooperation in their investigation of a major heroin dealer. Before he and Agent Bradley went to see respondent, Agent Hopson discussed her case with Dennis Malloy, the DEA agent primarily responsible for the investigation that led to respondent's arrest and indictment (Pet. App. 3a).[1] Agent Malloy knew that Agent Hopson hoped to secure respondent's assistance, and he permitted Hopson to examine the file on her case (*ibid.*). Although Agents Hopson and Bradley knew of the criminal charges pending against respondent, they did not notify her attorney or the United States Attorney's office that they wished to

[1] At the time he spoke with Agent Hopson, Agent Malloy knew that respondent was represented by retained defense counsel. As early as May 31, 1978, Agent Malloy and an Assistant United States Attorney had met with respondent's attorney for negotiations concerning the charges that would be filed against her (Pet. App. 3a).

interview her (*id.* at 3a–4a). Instead, they simply went to her house and questioned her about the source of her heroin during the period prior to her arrest. They told her that she faced a lengthy jail sentence and that, if she cooperated in their investigation, they would make a favorable sentencing recommendation to the United States Attorney. They also told her about the government's protection plan for informants (*id.* at 4a).[2]

Agent Hopson asked respondent whether she was represented by private counsel or by an attorney from the public defender's office. When she identified her retained counsel, Agent Hopson inquired how much she had paid him. Respondent said that she had paid him $200. Agent Hopson replied that he had seen the attorney's work in connection with another case in the past, and he suggested that respondent think about the kind of legal representation she could expect for the amount of money she was paying.[3] Agent Hopson also recommended that respondent seek the assistance

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[2] Respondent testified that the agents warned her that the trial judge in her case was "the worst SOB in the federal courtroom" (Pet. App. 4a n.3; A. 128a). The agents testified that they did not recall the specifics of this conversation, and they were never directly asked whether they had referred to the trial judge in such derogatory terms (Pet. App. 4a n.3; A. 24a–46a, 58a–63a, 108a–119a).

"A." refers to respondent's appendix in the court of appeals, 10 copies of which have been lodged with the Clerk of this Court.

[3] Respondent testified (A. 127a–128a) that Agent Hopson told her that her lawyer could not do anything for her and that all he wanted was her money. According to respondent, the agent warned that "'[i]f you decide to fight your case, your lawyer is

of a public defender if she wished to cooperate with the DEA (Pet. App. 4a; A. 104a–105a). Respondent did not give the DEA agents any information concerning her own case or the heroin dealer under investigation by Agents Hopson and Bradley. Agent Hopson left his telephone number with respondent, and the agents departed.

Respondent immediately called her attorney, and he went to her house. While he was there, respondent called Agent Hopson and arranged a meeting for the following day (Pet. App. 4a). Agent Hopson did not appear at the appointed hour, but he did visit respondent's house several hours later. When he arrived, respondent told him that she had company and therefore could not talk (*ibid.*; A. 140a, 169a). Promising to call later in the evening, Agent Hopson left. That night, between 9 and 10 p.m., Agent Hopson called respondent to arrange an appointment for the next day, August 25 (A. 141a, 156a–158a). Respondent testified that she told Agent Hopson that she wished to have her attorney present at such a meeting and that the morning hour proposed by the agent was

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going to make a[n] asshole out of hisself [sic] and you, too, in the courtroom.'" Respondent's son and sister also testified that Agent Hopson referred to respondent's attorney as an "asshole" (A. 166a–170a, 175a). Agent Hopson's account of the conversation did not include any mention of such an epithet, and he was not asked directly whether he had used the term. On direct examination by the Assistant United States Attorney, Agent Hopson was asked, "Did you make any comments specifically concerning [respondent's attorney]?" He replied, "I don't recall. I said that I was a case agent against [him] in the past. I don't recall any further representation. I may have; I may not have" (A. 104a–105a).

inconvenient because she had a dental appointment (A. 60a, 156a–158a).

The record does not show whether respondent and Agent Hopson agreed on a time for a meeting the next day, but, in any event, Agents Hopson and Bradley did visit respondent's house again on August 25, 1978. The conversation between them and respondent was similar to the one that had occurred two days earlier (Pet. App. 5a; A. 61a). Respondent told the agents that she had nothing to say and would speak with them only in the presence of her attorney (A. 112a, 141a–142a). The agents were annoyed, because they believed respondent's telephone call to Agent Hopson the previous afternoon meant that she was willing to cooperate with the DEA investigation. Agent Bradley testified (A. 117a–118a): "[B]oth of us actually were perturbed, not [to] the point of raising our voices, but we were disappointed and a little bit angered that we had to make a worthless trip out there." Agent Bradley told respondent that any further discussions would take place in the United States Attorney's office in the presence of her attorney (A. 112a, 118a). He then left the house, and Agent Hopson followed a few minutes later (A. 117a, 144a).[4]

2. Six days later, on August 31, 1978, respondent entered into a conditional plea agreement with the

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[4] Respondent testified (A. 144a) that after Agent Bradley left the house, Agent Hopson stated that her "'goddamn ass [would be] going to jail'" and that the trial judge to whom her case was assigned "'hate[s] black people.'" Agent Hopson recalled the August 25 conversation only in general terms, and he was not asked about the specific remarks attributed to him by respondent later in the hearing (A. 58a–63a).

United States Attorney. She agreed to plead guilty to the first count of the indictment, and the government agreed to dismiss the second count. She agreed to withdraw her remaining pretrial motions in the event the district court denied her motion to dismiss on the basis of the DEA agents' misconduct, and the government agreed that she could reserve her right to appeal such a denial, notwithstanding her guilty plea (A. 196a–198a, 209a–210a).

The district court denied respondent's motion to dismiss without opinion (A. 196a), and respondent formally entered her plea of guilty. In the ensuing Rule 11 proceeding (A. 205a–215a), respondent admitted that on April 12, 1977, she sold 26.56 grams of heroin to a government informant for $1,600. She also expressed agreement with the informant's statement that he had purchased heroin from her on numerous previous occasions and that, while her husband was in prison, she ran their heroin business from her home. Throughout the plea bargaining with the United States Attorney's office and the subsequent Rule 11 proceeding, respondent was represented by the same attorney who had represented her since the spring of 1978, before the indictment against her was returned by the grand jury.

3. The court of appeals reversed and directed the district court to dismiss both counts of the indictment with prejudice (Pet. App. 1a–11a). The court acknowledged that the district court had not made any findings of fact in connection with respondent's motion to dismiss (*id.* at 2a n.2); it ruled, however, that dismissal of the indictment was justified solely on the basis of the

undisputed facts and the testimony of the government's witnesses taken at face value (*ibid.*). The court did not disagree with the government's contention that respondent was not prejudiced by the DEA agents' misconduct in this case. Indeed, the court explicitly stated (*id.* at 11a) that "the importuning of the government agents [was] unsuccessful" and did not result in respondent's abandoning her counsel or providing information useful to the prosecution. Nonetheless, the court held that the indictment should be dismissed because of the agents' "deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial" (*ibid.*). The court observed that violations of the Sixth Amendment frequently may be remedied by the suppression of evidence obtained as the result of the misconduct or by the ordering of a new trial where a conviction has been tainted in some way by government interference with the attorney-client relationship (*id.* at 8a). Here, however, the agents' error "is not amenable to remedy through suppression or reversal of conviction" (*id.* at 10a). For that reason, the court concluded, dismissal of the indictment is an appropriate sanction.

The government's petition for rehearing was denied (Pet. App. 14a). Three judges of the court of appeals voted to grant rehearing en banc (Pet. App. 15a–25a). In an opinion joined by Judge Rosenn, Judge Garth stated that "the extreme sanction of dismissing the indictment" should not be imposed simply because "the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable,

conduct of the government in this case" (Pet. App. 18a). Stressing that respondent did not show or even claim that she was prejudiced by the government's misconduct (*id.* at 21a), Judge Garth warned that "as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*id.* at 22a).

Judge Garth stated (Pet. App. 22a–23a) that he agreed with the analysis of the Second Circuit in *United States* v. *Broward*, 594 F.2d 345, cert. denied, 442 U.S. 941 (1979). There, the court of appeals held that dismissal of an indictment is generally not an appropriate remedy when no prejudice is shown. The court said that in the absence of prejudice, dismissal should be considered, if at all, only in "the truly extreme cases," for example, a case in which such a drastic remedy is necessary "to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct" (594 F.2d at 351). Because there was no allegation or proof of "widespread, routine, constant or continuous" government misconduct in this case, Judge Garth concluded (Pet. App. 24a) that the public should not be "punished for the misconduct of a government agent" when that misconduct did not harm respondent.

Judge Adams voted for rehearing en banc (Pet. App. 24a–25a) because he viewed the question pre-

sented as "sufficiently important to warrant the attention of the full Court" and because the *Broward* decision "was not brought to the attention of the panel before its opinion was filed."

SUMMARY OF ARGUMENT

I

Respondent's Sixth Amendment right to the assistance of counsel was not violated in this case, because the criminal prosecution against her was not affected in any way by the DEA agents' misconduct. The Sixth Amendment lists a number of rights that the accused shall enjoy in all criminal prosecutions. The Amendment is concerned with protecting the fairness of criminal proceedings, and, when the fairness of such proceedings is not compromised, the Amendment is not violated. Here, respondent had the assistance of counsel for her defense at all stages of the prosecution. The DEA agents' effort to secure respondent's cooperation and to persuade her to change attorneys was completely unsuccessful: the agents obtained no information relevant to their investigation of major heroin traffickers, they obtained no incriminating evidence against respondent, and they failed to convince respondent to abandon her retained counsel. Nor has it been argued that their actions impaired counsel's effectiveness. This, of course, is not to suggest that the agents' disparagement of defense counsel was proper. It is only to say that, in the circumstances of this case, the agents' improper actions did not affect the criminal prosecution against respondent, and, for that reason,

her Sixth Amendment right to the assistance of counsel was not infringed.

II

Even assuming that the DEA agents' conduct did violate respondent's Sixth Amendment right to counsel, dismissal of the indictment was an inappropriate sanction in the absence of any prejudice to respondent's ability to defend herself at trial. Ordinarily, judicial remedies are designed to redress injuries actually suffered. If a defendant is denied the assistance of counsel at trial, he is entitled to a new trial at which he is represented by an attorney. But if an alleged constitutional violation has had absolutely no effect on a criminal prosecution, then there is no justification for remedying that violation in the course of the criminal proceeding. It is especially objectionable to *terminate* a criminal prosecution in such circumstances, because that relief is more extreme than what is usually thought sufficient even in situations where a constitutional infringement *has* had some substantial impact on the defendant's trial prospects.

If there must be some remedy for every constitutional violation, even one that causes no injury, then that remedy should be awarded in a separate proceeding, such as a civil action for damages, that does not interfere with the fair disposition of legitimate criminal charges. The government action of which respondent complains closely resembles a civil tort. It occurred long after respondent's criminal offense and did not influence her guilty plea to the charges against her. Particularly in the absence of any suggestion that

the DEA agents' misconduct is part of a pattern of continuing abuse of the criminal process, respondent should not be relieved of criminal responsibility for her acts on the basis of an incident that had no impact whatever on her prosecution.

ARGUMENT

Respondent has admitted selling heroin to a government informant in April 1977. The question presented in this case is whether respondent should escape criminal liability for her offense because, in August 1978, 16 months after the illegal narcotics sale, she was questioned by DEA agents in the absence of her attorney and was urged to cooperate in an ongoing DEA investigation of a third party and, toward that end, to obtain the assistance of different counsel.

Neither the court of appeals nor respondent herself has suggested that she suffered any prejudice as a consequence of the DEA agents' misconduct. Respondent rebuffed the agents' advances and immediately notified her attorney. The agents obtained no information from respondent. They learned nothing about her case or about the suspected narcotics dealer who was the subject of their investigation. Respondent's representation by counsel of her choice was uninterrupted. The record below and respondent's brief in opposition in this Court do not contain the slightest hint that respondent's potential defense at trial was damaged or rendered more difficult by the agents' visits or that her decision to plead guilty was in any way influenced by the DEA representatives.

Before accepting respondent's guilty plea, the district court found that it was knowingly and voluntarily made. Respondent does not contend otherwise. Nor does respondent assert that the extent of injury caused by the agents' improper intervention is unknown or unknowable. The simple fact is that, whatever the constitutional implications of the agents' actions, their immediate practical effect on respondent's prosecution and her relationship with her attorney was nil.

Nevertheless, respondent argues, and the court of appeals held, that the indictment against her should be dismissed. The court's decision necessarily involves a ruling on both the alleged violation of a constitutional right belonging to respondent and the appropriate remedy for such a violation, assuming one occurred. The government's position is that dismissal of an indictment is improper where the defendant complains of government misconduct unrelated to the commission of the offense with which he or she is charged and fails to make any showing that the objectionable behavior affected his or her ability to defend against the criminal charges. Viewed from one perspective, this absence of prejudice negates the existence of any constitutional violation; seen another way, it establishes that the drastic remedy of a judicial dismissal of criminal charges is not justified, even though some infringement of constitutional rights may have occurred. The choice between these two analytic paths may be problematical, but both lead to the conclusion that respondent's indictment should not have been dismissed. For present purposes, at least, it makes no practical

difference whether a showing of prejudice is regarded as an essential part of the proof of a constitutional violation or merely a prerequisite for imposition of the severe sanction of dismissal.[5] In either event, the court of appeals erred.

We proceed, therefore, to develop two alternative but parallel arguments. First, we argue that, because the DEA agents' misconduct did not have any prejudicial effect on respondent's defense strategy or her relationship with her attorney, she did not suffer any violation of her Sixth Amendment right to the assistance of counsel. Second, we contend that, because respondent was not injured by the agents' actions, dismissal of her indictment is an inappropriate remedy for any Sixth Amendment violation that did occur during the agents' conversations with respondent outside the presence of her attorney.

I

THE DEA AGENTS' MISCONDUCT DID NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL

In attempting to determine whether the DEA agents' actions violated respondent's constitutional right to the assistance of counsel, we begin with the language of the Sixth Amendment. The Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

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[5] The difference might be material in the context of a civil action for damages. See note 12, *infra*.

There is no question that in the present case respondent had the assistance of counsel at all critical stages of the prosecution against her. She retained an attorney soon after her arrest, and he promptly began negotiations with government attorneys, approximately one month before the indictment against respondent was returned (Pet. App. 2a–3a). The same attorney represented respondent throughout the proceedings in the district court and the court of appeals, and he continues to represent her, now on a court-appointed basis, in this Court. Respondent does not suggest that defense counsel's assistance was impaired at any stage of the proceedings. In short, the requirement imposed by the unadorned language of the Sixth Amendment seems clearly to have been satisfied in this case. Respondent had "the Assistance of Counsel for [her] defence," and she thus enjoyed fully the constitutional protection explicitly guaranteed by the relevant portion of the Sixth Amendment.

Respondent argues, however, that her Sixth Amendment right to counsel was violated because law enforcement officers deliberately questioned her in the absence of her attorney and tried to persuade her to change counsel to facilitate her cooperation with the government. Both respondent and the court of appeals focus on the impropriety of the agents' conduct rather than its effect on respondent. But, for purposes of the Sixth Amendment, and most other Bill of Rights provisions as well, the critical consideration is the actual impact of governmental action on the individual. The court of appeals' failure to recognize this point is the fundamental flaw in its decision. Law enforcement of-

ficers may behave rudely or arbitrarily, they may even violate administrative regulations or statutes specifically intended to govern their actions, but they do not deprive a person of his constitutional rights unless their misconduct has some practical effect on that person.

This point can be illustrated, in the constitutional context most pertinent here, through an examination of the Sixth Amendment as a whole. The Amendment establishes not only an accused's right to the assistance of counsel but also a variety of other procedural guarantees designed to ensure the fairness of criminal prosecutions. The accused is entitled to a speedy and public trial by an impartial jury in the state and district where the alleged offense was committed. He is entitled to be informed of the charges against him, to be confronted with the witnesses against him, and to have the benefit of compulsory process for obtaining witnesses in his favor. All of these rights concern the fairness of criminal trials. They reflect the Framers' insistence that persons charged with criminal offenses be convicted and punished only after a trial satisfying certain specified minimal standards of procedural fairness. Because the various clauses of the Sixth Amendment all focus on the fairness of criminal proceedings, it is to that subject that courts should address themselves in determining whether any Sxith Amendment right has been violated. See, *e.g.*, *United States* v. *Wade*, 388 U.S. 218, 226–227 (1967). Overreaching law enforcement officers may improperly attempt to thwart or interfere with the exercise of a Sixth Amendment right, but, if the effort is unsuc-

cessful and the right fully exercised, the fairness of the underlying criminal proceeding is unaffected and no constitutional deprivation has occurred.

This does not mean, of course, that such misconduct by government agents should be condoned or encouraged. Police efforts to intrude on a criminal defendant's relationship with his attorney are no less improper because they fail. It does mean, however, that the court of appeals erred in concluding (Pet. App. 7a–8a) that the dispositive factor in determining whether respondent's right to counsel was violated is the wrongful motivation of the government agents involved. That wrongful motivation may bear heavily on the need for administrative reform within the DEA or for disciplinary measures against Agents Hopson or Bradley. But it is largely irrelevant to the question whether respondent was denied "the Assistance of Counsel for [her] defence."

Of course, one might object to this line of reasoning on the ground that it makes the existence of a constitutional violation depend too heavily on the reaction of the person at whom government misconduct is directed. It might at first seem anomalous that the question whether a person's right to counsel has been violated should turn in such large measure on how he or she responds to objectionable actions by law enforcement officers. In fact, however, such considerations are frequently critical in constitutional litigation, and it is commonplace for courts to rule that the occurrence of a constitutional violation depends in part on factors beyond the knowledge or control of government agents.

The analogy to Fourth Amendment cases is instructive in this regard. Suppose that overzealous law enforcement officers, unconcerned about the constitutional protection against unreasonable searches, burst unannounced into a dwelling that they fully believe is occupied. If they discover to their surprise that the dwelling is uninhabited and abandoned, or if the occupants for some reason lack a legitimate expectation of privacy in the dwelling, the officers may well commit no Fourth Amendment violation, although their intent deliberately to ignore the Amendment's provision is no less offensive for that reason. Indeed, in *Scott* v. *United States*, 436 U.S. 128 (1978), this Court expressly held that the subjective intent of law enforcement officers not to comply with a minimization requirement in a district court's wiretap order was not, by itself, sufficient to establish a constitutional or statutory violation, in the absence of some evidence that objectively unreasonable interceptions of conversations occurred. By the same token in the present case, although the conduct of the DEA agents would have been improper whatever the reception accorded it by respondent, respondent's adamant refusal to cooperate with the agents and her undisputed allegiance to her attorney successfully averted any Sixth Amendment violation that might otherwise have occurred.[5a]

This view is supported by *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). There, the Court declined to find

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[5a] See also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) ("proof of prejudice is generally a necessary but not sufficient element of a due process claim" based on pre-indictment delay).

a violation of the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, even though an undercover state police agent was present at meetings between a criminal defendant and his attorney. The Court emphasized that the agent's intrusion did not produce any evidence used against the defendant at trial and did not result in the communication of defense strategy to the prosecution (*id.* at 558). Because the agent's attendance at the meetings did not have any effect on the defendant's trial and conviction, the Court held that the defendant had not suffered any deprivation of his constitutional rights. *Weatherford* thus indicates that some showing of prejudice is a prerequisite to a finding that alleged government misconduct violated the Sixth Amendment.

Both respondent and the court of appeals (Pet. App. 6a–8a) have attempted to distinguish *Weatherford* from the present case on the ground that *Weatherford* did not involve a "wrongly motivated intrusion into the attorney-client relationship." By contrast to the DEA agents' deliberate attempts to undermine respondent's relationship with defense counsel as a means of securing her cooperation in an investigation of third parties, the undercover officer in *Weatherford* passively attended a meeting between the defendant and his attorney solely in order to maintain the secret of his identity and thus to preserve his effectiveness as an undercover investigator. The Court recognized "the unfortunate necessity of undercover work" (429 U.S. at 557) and observed that the officer attended the meeting only in order to avoid raising suspicion and

only at the invitation of the defendant and his lawyer. The Court concluded that there had been no "purposeful intrusion" (*id.* at 558) into the attorney-client relationship.

The Court did not hold or even suggest, however, that such a "purposeful intrusion," without more, would automatically establish a Sixth Amendment violation. On the contrary, the Court's opinion, read as a whole, demonstrates that government invasions of the attorney-client relationship, whatever their motivation, must be evaluated in terms of their effect on the fairness of the criminal trials that follow. The Court explained (429 U.S. at 554) that it might well have reached a different result, notwithstanding Weatherford's legitimate motives for attending the attorney-client conference, if the agent's attendance had operated to Bursey's disadvantage.

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

And, in concluding the relevant portion of its opinion, the Court stated flatly (*id.* at 558) that "unless Weatherford communicated the substance of the Bursey-Wise conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to

the State, there can be no Sixth Amendment violation."[6]

The indispensability of trial prejudice as an element of a Sixth Amendment violation is also reflected in other decisions of this Court. For example, in *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), the Court held that a criminal defendant "was denied the basic protections of [the Sixth Amendment] *when there was used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and

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[6] Federal courts of appeals other than the Third Circuit have endorsed the reading of *Weatherford* espoused here. See, *e.g.*, *United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980), discussing *Weatherford* and drawing the following conclusion (*id.* at 1186–1187; footnotes omitted):

> [I]t is apparent that mere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

See also *United States* v. *Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979) (emphasis added), stating that in *Weatherford*,

> the Supreme Court held that to establish a Sixth Amendment violation where an informant sat in on defense strategy sessions defendants were required to establish that privileged information had been passed to the government or that the government had intentionally invaded the attorney client relationship, *and resulting prejudice*.

in the absence of his counsel" (emphasis added). Nowhere in the *Massiah* opinion did the Court say that the defendant's right to counsel had been violated by the way in which the government obtained his incriminating statements. Rather, the Court carefully explained that, because of the way the statements had been obtained, their use at trial violated the Sixth Amendment (*id.* at 202, 203, 207).

Likewise, in *United States* v. *Henry*, No. 79–121 (June 16, 1980), the Court characterized the question presented as "whether respondent's Sixth Amendment right to the assistance of counsel was violated *by the admission at trial* of incriminating statements made by respondent to his cellmate, an undisclosed government informant, after indictment and while in custody" (slip op. 1; emphasis added). To be sure, later in its opinion (slip op. 10) the Court did state that "[b]y intentionally creating a situation likely to induce [respondent] to make incriminating statements without the assistance of counsel, the government violated [respondent's] Sixth Amendment right to counsel." We believe, however, that the latter statement, made in summation at the conclusion of the Court's opinion, should not be permitted to divert attention from the theme of trial prejudice stressed in *Massiah* and reemphasized at the beginning of the *Henry* decision. Any different approach would result in a holding that a defendant in the position of Massiah or Henry suffers an infringement of his Sixth Amendment rights even if he does not speak to the government agent or informant who engages him in conversation. Such a holding would be inconsistent with the final paragraph of the

Massiah opinion, in which the Court explicitly eschewed the opportunity to find fault with the government's investigative methods and observed that the constitutional problem in the case arose only because the statements obtained from Massiah were used against him at trial. In response to the government's argument that the challenged interception of Massiah's conversation was a necessary and proper method of investigating the suspected larger criminal enterprise of which Massiah was a part, the Court stated (377 U.S. at 206–207):

> We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial. [7]

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[7] With respect to the DEA agents' conduct in the present case, we are not certain that any judicially cognizable impropriety would have been involved had the agents merely approached respondent in the absence of her counsel for the purpose of obtaining information regarding criminal activity by third parties. (As we explain at pages 43–45, *infra*, even this conduct alone, in the absence of extenuating circumstances, would have violated internal Department of Justice guidelines.) But, however that may be, the agents' actual conduct here was unquestionably improper, because of the apparent effort to disparage defense counsel. Although we argue that this behavior is without constitutional consequence because it did not affect respondent's

We have been unable to discover any case in which this Court has found a violation of the Sixth Amendment in a situation where the fairness of the criminal proceedings against a defendant has not been compromised. On some occasions, of course, where there has been a direct interference with defense counsel's efforts to assist his client at trial, the Court has not required a specific demonstration of the precise way in which that interference or deprivation has affected the defendant adversely. The Sixth Amendment entitles the accused to "the Assistance of Counsel for his defence," and, when the accused has been compelled to proceed without counsel or when counsel has been prevented from discharging his normal functions at trial, the Court has not hesitated to find a Sixth Amendment violation without any more detailed showing of prejudice. See, *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (defense counsel prevented from consulting with his client during an overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (counsel denied the opportunity to make a summation of evidence before the rendition of judgment); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (indigent defendant denied the assistance of counsel in a felony trial); *Ferguson* v. *Georgia*, 365 U.S. 570 (1961) (defense counsel denied the opportunity to ask defendant questions when defendant made statement at trial); *Glasser* v. *United States*, 315 U.S. 60 (1942) (defendant's retained counsel appointed by the court to represent a co-defendant as well). In such situations, the defend-

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confidence in her attorney, we do not intimate that the agents' negative comments about defense counsel were in any way justifiable.

ant simply has not received what the Constitution expressly guarantees, and that in itself is sufficient to establish that the Sixth Amendment's standards of fairness in criminal prosecutions have not been satisfied.

In other cases, the leading example of which is *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court has ruled that events occurring before trial have so hampered defense counsel in his ability to represent the accused at trial that the constitutional guarantee would be vitiated if the results of the trial were allowed to stand. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (remanded for determination whether lack of counsel at pre-indictment preliminary hearing prejudiced defendants at their later trial); *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961) (absence of counsel at post-indictment arraignment "may affect the whole trial"); *Hawk* v. *Olson*, 326 U.S. 271 (1945) (denial of requested 24-hour continuance after arraignment to enable accused to consult counsel, subpoena witnesses, and prepare defense); *Williams* v. *Kaiser*, 323 U.S. 471 (1945) (lack of counsel at guilty plea proceeding).

Finally, in a third group of cases, the Court has held that, because certain incriminating evidence was acquired from the defendant in the absence of counsel, that evidence and any additional evidence derived from it may not be introduced at the defendant's trial. The rationale of these decisions is that, if the constitutional right to the assistance of counsel at trial is to be meaningful, a criminal conviction cannot be based on evidence obtained from an uncounselled defendant, after the initiation of criminal proceedings and before

trial, under circumstances in which the presence of an attorney might significantly affect the character of the evidence obtained or its subsequent presentation and evaluation at trial. See, *e.g.*, *Massiah* v. *United States*, *supra* (post-indictment conversation with government informant monitored by police); *United States* v. *Wade*, *supra* (post-indictment lineup); *Moore* v. *Illinois*, 434 U.S. 220 (1977) (confrontation with complaining witness at pre-indictment preliminary hearing). And compare *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (custodial interrogation immediately after arrest), with *Kirby* v. *Illinois*, 406 U.S. 682 (1972) (confrontation with complaining witness at police station two days after crime). See also *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975) ("The Court has identified as 'critical stages' those pretrial procedures *that would impair defense on the merits* if the accused is required to proceed without counsel" (emphasis added)).

Throughout all these cases, the Court has focused on the role of defense counsel in criminal prosecutions and, in particular, criminal trials. When counsel has been absent in some setting outside the judicial arena (*e.g.*, at a police lineup involving the defendant or during questioning of the defendant by government agents), the Court has found a Sixth Amendment violation only when the government has obtained incriminating evidence from the defendant at the time of counsel's absence and has then introduced that evidence, or other evidence derived from it, at the defendant's trial.[8] The Court has never found a Sixth

[8] For example, the Court in *Wade* was careful to explain that defense counsel should have been present at the post-indictment

Amendment violation solely on the ground that government agents have interviewed a defendant or conducted a lineup involving him outside the presence of his attorney. Assuming that such a procedure occurs after the beginning of a criminal prosecution and without the authorization of defense counsel, the defendant nevertheless suffers no denial of his Sixth Amendment right to counsel, as long as the unauthorized government contact does not affect the defendant's prosecution.

The unauthorized interview or lineup may have no effect on the defendant's prosecution because it does not produce any evidence or information that tends to incriminate the defendant or assist the prosecution. Alternatively, the procedure may have no effect on the prosecution because any incriminating evidence or other useful information that is produced is not used, directly or indirectly, by the government at trial. Such non-use of probative evidence may occur as the result of a suppression order or a voluntary decision by the government. For present purposes, it is irrelevant

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lineup only because the lineup could have affected the defendant's trial, not because the lineup itself threatened to impose some disability on the defendant or to violate his constitutional rights. The Court stated (388 U.S. at 236–237) (footnote omitted):

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama*, 287 U.S. 45, 57.

why, in a particular situation, an unauthorized government contact with a defendant in the absence of his attorney does not affect that defendant's prosecution. The important point here is that effect on a criminal prosecution is the criterion by which such extrajudicial contacts should be judged, and when no such effect can be identified, no Sixth Amendment violation has occurred.[9]

II

EVEN IF THE DEA AGENTS' CONDUCT VIOLATED RESPONDENT'S SIXTH AMENDMENT RIGHTS, DISMISSAL OF THE INDICTMENT IS AN INAPPROPRIATE SANCTION

We assume for the remainder of this brief that, contrary to the argument elaborated in point I of the brief, the DEA agents' questioning of respondent and their recommendation that she obtain a different attorney did violate her constitutional right to the assistance of counsel, guaranteed by the Sixth Amendment. Indeed, we now assume for the sake of argu-

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[9] Accordingly, in the Sixth Amendment context, the suppression of improperly obtained evidence can serve to avert the occurrence of any constitutional violation, if, through such an exclusion, the court can prevent an unauthorized government contact with a defendant in the absence of counsel from having any effect on the defendant's prosecution. By contrast, in the Fourth Amendment setting, the suppression of improperly obtained evidence is intended to deprive the government of the fruits of a constitutional violation that has already occurred, namely, an illegal search or seizure. The exclusion of evidence in the Fourth Amendment context does not directly repair the unconstitutional invasion of privacy that has already occurred but is designed instead to deter future violations of a similar nature.

ment that the court of appeals was correct in its apparent holding (Pet. App. 7a) that the Sixth Amendment is violated whenever a wrongly motivated government agent seeks to intrude on a criminal defendant's relationship with his attorney. Having made this assumption, however, we continue to submit that the court of appeals' disposition of this case was wrong. That is because a significant question regarding the appropriate remedy remains to be resolved once a court has found that a constitutional violation has occurred. Here, the court of appeals applied the extreme sanction of dismissal of a criminal indictment with prejudice, even though respondent was not injured in any way by the DEA agents' misconduct. By awarding relief so thoroughly disproportionate to the actual harm incurred by respondent, the court of appeals erred.

Courts ordinarily tailor their remedies to fit the injury suffered in a particular situation. For example, when counsel is denied altogether, and a defendant is convicted after a trial at which he is not represented by an attorney, a reviewing court will order a new trial and will direct that the defendant be permitted to retain counsel or that counsel be appointed. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, *supra*. Likewise, when judicial action before or during trial prevents counsel from rendering full and effective assistance to his client at trial and the client is convicted, the conviction will be overturned and a new trial ordered. See, *e.g.*, *Geders* v. *United States*, *supra*; *Herring* v. *New York*, *supra*; *Powell* v. *Alabama*, *supra*.

Similarly, when government agents improperly overhear pretrial conversations between a defendant and his lawyer, and the defendant is subsequently convicted, a new trial may be ordered to ensure that the conviction is not based on wrongfully obtained information regarding the defendant's trial strategy or other matters material to the trial. *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Alternatively, the district court may be required to conduct a hearing on the effect of the intrusion on the fairness of defendant's trial and to order a new trial if it determines that the conviction is tainted by the interference with the attorney-client relationship. See *Black* v. *United States*, *supra*, 385 U.S. at 29–31 (Harlan, J., dissenting); *O'Brien* v. *United States*, *supra*, 386 U.S. at 345–347 (Harlan, J., dissenting). In an extreme case, where the taint cannot be purged by a new trial (*e.g.*, where the government has learned of confidential defense strategy and the court has no way to ensure that the government will not use this information in preparing for a second trial), it has been held that a court may order dismissal of the indictment to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978); *United States* v. *Peters*, 468 F. Supp. 364 (S.D. Fla. 1979).

In other cases, when the defendant has the benefit of counsel at all judicial proceedings, but incriminating evidence is obtained from him outside of court in the absence of his attorney, the suppression of the evidence so obtained and any other evidence derived from it is sufficient to remedy whatever Sixth Amendment

violation may have occurred when the evidence was acquired. See, *e.g.*, *United States* v. *Wade*, *supra*; *Gilbert* v. *California*, 388 U.S. 263 (1967) (evidence obtained by lineup); *Massiah* v. *United States*, *supra*, (evidence obtained during post-indictment conversation with government informant). If such evidence is erroneously admitted and a conviction follows, a new trial will be ordered on appeal, unless a court determines that admission of the evidence was harmless error. See *Moore* v. *Illinois*, *supra*, 434 U.S. at 232; *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *United States* v. *Wade*, *supra*, 388 U.S. at 242.

Throughout all these cases, the critical consideration in choosing a remedy for a Sixth Amendment violation is the protection of the fairness of the criminal proceedings against the defendant. The remedy in any given case is no broader than is necessary to ensure that the defendant fully enjoys the right to "have the Assistance of Counsel for his defence." Even when a defendant receives no legal assistance whatever, as in *Johnson* v. *Zerbst*, *supra*, or *Gideon* v. *Wainwright*, *supra*, the Court has not said that the charges against him should be dismissed. Rather, the Court has ruled that the defendant should be provided with counsel and then retried with the help of a lawyer. The remedy should certainly not be more drastic where, as here, the fairness of criminal proceedings and the effectiveness of defense counsel's assistance have remained unimpaired by the Sixth Amendment violation of which the defendant complains.

The result reached by the court of appeals in this case essentially reverses the general remedial rule

that the extent of relief awarded varies directly with the extent of injury suffered. The dismissal of respondent's indictment, in the absence of any showing of prejudice, indicates that, at least in cases involving a "wrongly motivated intrusion into the attorney-client relationship," the court of appeals will award the greatest remedy to the defendants who have suffered the least harm. The court of appeals did not hold that any such wrongly motivated intrusion will inevitably result in the dismissal of an indictment. Rather, it ruled that such an extreme remedy will be ordered especially, and perhaps only, when other more common remedies are unavailable because the constitutional violation has not affected the criminal proceedings against the defendant in any way. The idea that the most far-reaching relief should be reserved for those cases in which the injury is least severe finds no support in this Court's prior decisions.

This Court has never suggested that a defendant who is the victim of intentional government misconduct is entitled to a dismissal of the indictment against him, even if he has suffered no prejudice as a result of the constitutional violation. Indeed, in the Fifth Amendment context, the Court has expressly ruled that dismissal of an indictment is too drastic a remedy for the acquisition of evidence in violation of the privilege against compulsory self-incrimination. The Court has not distinguished between intentional and inadvertent government misconduct in this regard. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (footnote omitted), in which the Court stated:

> Even if we assume that the Government did acquire incriminating evidence in violation of the

> Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Likewise, in cases interpreting and implementing the Fourth Amendment, the Court has never ordered dismissal of an indictment as a remedy for an unconstitutional search or seizure, even when circumstances indicated that the police misconduct involved was deliberately unlawful. In particular, if a defendant had suffered an unconstitutional search that uncovered no evidence, we think it is virtually inconceivable that this Court would hold that, suppression of evidence being unavailable, it would be proper to dismiss the indictment.

Nor has the Court ever held that evidence seized in deliberate violation of a person's Fourth Amendment rights must, for that reason alone, always be suppressed in all judicial proceedings. In fact, in a variety of situations, even the remedy of excluding illegally seized evidence has been limited or held unavailable, on the basis of the Court's conclusion that such relief would not contribute appreciably to the goal of deterring future unlawful searches and seizures. See, *e.g.*, *United States* v. *Havens*, No. 79-305 (May 27, 1980), slip op. 6-7; *Rakas* v. *Illinois*, 439 U.S. 128 (1978);

Stone v. *Powell*, 428 U.S. 465 (1976); *United States* v. *Calandra*, 414 U.S. 338 (1974); *Alderman* v. *United States*, 394 U.S. 165 (1969). The Court's decisions in these cases did not depend on whether the police acted in good faith in their acquisition of incriminating evidence in violation of the Fourth Amendment. Even if the police had acted with a willful disregard for the constitutional rights of others, the Court was unwilling, in the particular circumstances involved, to incur a significant cost to the criminal justice process (*i.e.*, the suppression of probative evidence) without some concomitant foreseeable gain in the effort to deter future Fourth Amendment violations.[10] If even the remedy of suppression is regarded as too extreme in some cases where illegally seized evidence is used against a defendant and where injury is thus demonstrable, then surely the more drastic sanction of dismissal of an indictment is excessive where the government agents' unconstitutional behavior does not harm the defendant or anyone else.

There is simply no logical reason why a person who admittedly sold heroin to a government informant in April 1977 should be relieved of criminal responsibility for that act because she was improperly questioned by government agents in August 1978. The principal fal-

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[10] Of course, there may be other situations in which the good faith of law enforcement officers *is* material to the decision whether to apply the Fourth Amendment exclusionary rule. See *Scott* v. *United States*, *supra*, 436 U.S. at 136, 139 n.13. The Fifth Circuit, sitting en banc, has recently held as much. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980). The point here, however, is that the bad faith of a police officer, without more, has never been thought to require a sanction against the prosecution in a criminal case.

lacy in the court of appeals' opinion is the court's implicit underlying assumption that, if the constitutional violation suffered by respondent is to be remedied at all, it must be remedied *in the criminal prosecution* pending against her. Of course, a person who has not suffered any discernible injury is ordinarily not entitled to any remedy whatever. But even assuming that anyone whose Sixth Amendment right to counsel has been violated is entitled to *some* relief, it does not follow that that relief must be awarded in a pending criminal proceeding. Where the criminal proceeding itself has not been affected by the government misconduct, it should not be aborted or otherwise curtailed. Rather, the defendant should be remitted to whatever civil remedies he may have against the government agents responsible for the constitutional violation or against the government itself as the agents' employer.

In the present case, the DEA agents' improper visits and conversations with respondent were not part of the criminal acts she performed 16 months earlier[11] and did not contribute to the government's ability to prosecute her for the distribution of heroin. Accordingly, if respondent can successfully claim any relief, she should be required to do so in some proceeding

[11] Cf. *Hampton* v. *United States*, 425 U.S. 484 (1976), in which petitioner contended that the Due Process Clause of the Fifth Amendment barred his conviction because law enforcement officers were excessively involved in the criminal enterprise. The plurality opinion stated (425 U.S. at 490): "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

separate from her criminal prosecution.[12] The adequate redress of essentially tortious conduct is, after all, one of the primary purposes of civil proceedings.

In his dissent from the court of appeals' denial of rehearing en banc, Judge Garth cogently exposed the logical flaws in the panel's reasoning. He explained that the court's finding of a constitutional violation does not lead inevitably to the conclusion that the indictment should be dismissed. On the contrary, "dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means" (Pet. App. 21a). The court's decision, in Judge Garth's words, "turns [this rule] on its head"

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[12] Relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent may be able to state a cause of action for damages against the DEA agents on the basis of their alleged Sixth Amendment violations. Pet. App. 19a n.2, 22a n.4; *Davis* v. *Passman*, 442 U.S. 228 (1979). *Weatherford* itself was a damage suit, brought under 42 U.S.C. 1983, against the state undercover officer and another state official who was allegedly responsible for the intrusion of a police agent into the meeting between a criminal defendant and his attorney. See also *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). On August 22, 1979, respondent filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking $10,000 compensatory damages and $100,000 punitive damages against the DEA and Agents Hopson, Bradley, and Malloy for their roles in the incidents now under consideration. The suit is still at the discovery stage. It potentially presents several difficult factual and legal questions, *e.g.*, whether respondent will be able to prove actual damages even though she suffered no prejudice in her criminal case; whether punitive damages should be available in the absence of substantial actual damages; whether punitive damages are ever available in a *Bivens* action; whether federal law (the law that presumably governs *Bivens* actions) should adopt a punitive damages standard derived from state law or

(*ibid.*). The indictment is dismissed, not because the court cannot conceive of any other way to remedy the injury suffered by respondent, but because respondent was not injured and the court therefore cannot imagine any other remedy that is available. The consequences, as Judge Garth observed (*id.* at 22a), are little short of

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should develop its own common law standard. But however these questions may be resolved, the propriety of the court of appeals' dismissal of respondent's indictment will not be affected. That remedy remains inappropriate, regardless of whether other relief is available.

We note for the Court's information that the 95th Congress considered proposed legislation that would make a claim against the United States the exclusive civil remedy for many kinds of wrongful acts that may be performed by federal employees acting within the scope of their employment. See H.R. 9219, S. 2117, 95th Cong., 1st Sess. (1977). The bills provided that, with respect to constitutional tort claims, the United States would be liable for liquidated damages of $1,000, in the absence of proof of actual damages in a greater amount. See *Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 2 (1978). Similar legislation has been introduced in the 96th Congress (H.R. 2659), and the House Judiciary Committee held hearings on the bill during the summer of 1979. See *Amendment of the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

In addition, of course, although respondent could not have benefited directly from such action, the DEA agents in this case were subject to possible departmental disciplinary measures. In the petition for a writ of certiorari (Pet. 17 n.10), we informed the Court that DEA officials were actively considering the imposition of sanctions against Agent Hopson, including a possible temporary suspension. We have now been advised by the Chief Counsel's office of DEA that a two-day suspension of Agent Hopson was initially proposed and that, after full investigation, the agent received a written reprimand, a copy of which has been retained in his personnel file.

absurd. Not only is a criminal defendant immunized although government misconduct has caused her no harm, but future defendants are taught they "may be better off by alleging no prejudice" than by complaining of any injury suffered as the result of a constitutional violation (*ibid.*). In the latter event, the most likely remedies are the suppression of evidence, a new trial order, or an order vacating a tainted guilty plea. But, if a defendant "succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*ibid.*).

Federal courts of appeals other than the Third Circuit have consistently declined to dismiss indictments based on nonprejudicial government misconduct. Because allegations of government misconduct usually arise in distinctive factual situations, the circumstances of these earlier cases are often quite different from those presented here. Nevertheless, the fundamental point repeatedly asserted in other appellate opinions is directly applicable to the controversy now before the Court: where a defendant is not injured by improper government action, he is not entitled to a dismissal of his indictment as a remedy for that action.

For example, in *United States* v. *Fields*, 592 F.2d 638 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979), the court of appeals rejected the argument that a securities fraud indictment should be dismissed because attorneys at the Securities and Exchange Commission concluded a settlement with the defendants in a civil injunctive proceeding without disclosing that they had urged the United States Attorney to conduct a criminal investigation of the same transactions. The court of

appeals agreed that the SEC attorneys had acted improperly, but neither the defendants nor the court could identify "any resulting harm to defendants" (592 F.2d at 647). Accordingly, the court refused to dismiss the indictment, explaining that "[i]t is only in the rare case [of government misconduct], where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor, that the indictment may be dismissed" (*id.* at 648). See also *United States* v. *Artuso*, 618 F.2d 192, 196–197 (2d Cir. 1980); *United States* v. *Brown*, 602 F.2d 1073, 1076–1078 (2d Cir.), cert. denied, 444 U.S. 952 (1979); *United States* v. *Broward*, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941 (1979); *United States* v. *Kilrain*, 566 F.2d 979, 982–983 (5th Cir.), cert. denied, 439 U.S. 819 (1978); *United States* v. *Acosta*, 526 F.2d 670, 674 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Jimenez*, No. 79–2190 (7th Cir. Aug. 6, 1980), slip op. 5–6; *United States* v. *Stanford*, 589 F.2d 285, 299–300 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196–1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Glover*, 596 F.2d 857, 861–864 (9th Cir.), cert. denied, 444 U.S. 860 (1979); *United States* v. *Owen*, 580 F.2d 365, 367–368 (9th Cir. 1978). But see the dictum in *United States* v. *McCord*, 509 F.2d 334, 348–351 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) ("serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused," but "prejudice, actual or po-

tential, is relevant" (509 F.2d at 349, 350) to the determination).

In answer to this line of authority, respondent relies primarily on three state cases, two of which are easily distinguishable from the present situation by virtue of the prejudice suffered by the defendant as a consequence of the behavior of law enforcement officers. In *People* v. *Mason*, 97 Misc. 2d 706, 411 N.Y.S.2d 970 (Sup. Ct. 1978), local detectives destroyed the defendant's relationship with his Legal Aid attorney by telling the defendant that defense counsel was "young, inexperienced, and clearly no match" for the city prosecutors who would be handling his case. Over the Legal Aid attorney's objection, the defendant, while under indictment for distributing controlled substances, became an informant for the anti-corruption prosecutor, assisting in the investigation of an alleged scheme to "fix" narcotics cases through payments to someone in the New York City criminal court building. The defendant contacted the suspected architect of the scheme and was referred to a defense attorney. This attorney was then substituted as defendant's counsel in the narcotics prosecution pending against him. For approximately six months, the defendant had no independent legal assistance but was advised only by a lawyer who may well have been part of the criminal activity that the defendant was helping to investigate. Moreover, the anti-corruption prosecutor misled the defendant into believing that his cooperation would have a favorable effect on the disposition of the outstanding narcotics charges against him, when the prosecutor well knew that the relevant New York

statute severely circumscribed the sentencing options available to a trial judge. Under these circumstances, and in view of the passage of several years since the defendant's arrest and indictment, the state court concluded that the defendant had been adversely affected by the government's interference with his right to counsel and that the damage to his ability to defend himself against the narcotics charges could not be repaired by the appointment of new counsel. Accordingly, the court dismissed the indictment.

Similarly, in *People* v. *Moore*, 57 Cal. App. 3d 437, 129 Cal. Rptr. 279 (Ct. App. 1976), the State used the defendant as an undercover informant while criminal charges were pending against him. The defendant was explicitly instructed not to inform his attorney about his dealings with the district attorney's office, and one of the state investigators falsely told the defendant that his attorney was inadequate and had been disbarred. State officials also advised the defendant to leave a false telephone number with his attorney. On one occasion, approximately five months after the defendant had begun his cooperation, after he had already testified for the State at two trials, including a murder trial, and after he had suffered two physical attacks apparently motivated by his performance as an informant, he was arrested for a parole violation. Defense counsel was not informed of his whereabouts, and the defendant was not released to attend a pretrial conference on the pending charges against him. When counsel could not explain his client's absence, the court, unaware that the defendant was already incarcerated at the city jail, issued a bench warrant for his

arrest. When all these events came to light, the trial judge dismissed the charges against the defendant, and the intermediate appellate court affirmed. The court of appeal held that the State's conduct had "debased the attorney-client relationship" and had deprived the defendant of the effective assistance of counsel during the period of the defendant's cooperation, thereby jeopardizing his personal safety and causing him to "relinquish[ ] the basis on which he and his counsel might have reached a favorable plea bargain with the district attorney" (57 Cal. App. 3d at 441, 129 Cal. Rptr. at 281).

In both *Mason* and *Moore*, the defendants were obviously prejudiced by the government misconduct, and the state courts found that the injuries suffered could not be redressed by any relief short of a dismissal of the indictment. Among the three state cases on which respondent chiefly relies, only *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N.E. 2d 635 (1977), involves a factual situation that resembles the one presented here. The similarity between *Manning* and the present case is unmistakable, and the Supreme Judicial Court of Massachusetts held that the indictment should be dismissed with prejudice notwithstanding trial court findings (i) that the relationship of the defendant with his attorney was not seriously impaired by the misconduct of government agents and (ii) that the defense offered at trial was not adversely affected by the agents' disparaging remarks about defense counsel or by their efforts to elicit the defendant's cooperation in an ongoing narcotics investigation. The Supreme Judicial Court explained that, in its view,

"[p]rophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights" (373 Mass. at 444, 367 N.E. 2d at 639). The court therefore reversed the judgment of the intermediate appellate court[13] and set aside the defendant's convictions.

We believe that *Manning* was wrongly decided for the same reasons that the court of appeals' decision in the present case was erroneous. If the defendant in *Manning* suffered any injury as the result of the government misconduct, he was entitled to relief for that injury. But if the criminal proceedings against him, like those against respondent, were not prejudiced in any way by the wrongful actions of law enforcement officers, he was not entitled to any remedy in those proceedings, and he certainly was not entitled to a dismissal of the indictment against him. The New Jersey Supreme Court has recently adopted this reasoning in a case involving deliberate and extensive government eavesdropping on conversations between a defendant in custody and his attorneys. The court

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[13] The intermediate appellate court had declined to dismiss the indictment but had offered the defendant a new trial with different counsel of his choice, the attorney fees to be paid by the county without regard to any question of indigency, if the defendant requested such relief after announcement of the court's decision. See *Commonwealth* v. *Manning*, 5 Mass. App. 25, 359 N.E. 2d 51 (1977). The intermediate court stressed that the motions judge in the court below had found no "'*serious* impairment of the relation of counsel and client'" as a result of the agents' misconduct. Implicit in that finding, the appellate court thought, was "a finding that the defendant had been prejudiced to some extent" by the misconduct (359 N.E. 2d at 55). Accordingly, the court deemed it appropriate to offer the defendant a new trial if he wanted one.

stressed that no witnesses or evidence tainted by the State's monitoring of the attorney-client conversations could be used in the criminal proceedings against the defendant. At the same time, however, the court refused to dismiss the indictment. The court stated that "dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that relationship or reveals defendant's trial strategy." *State* v. *Sugar*, 27 Crim. L. Rep. (BNA) 2453, 2454 (July 24, 1980). Since the State's eavesdropping had not produced either of these results, the court declined to terminate the prosecution. This is the approach that should have been followed in *Manning* and by the court of appeals in the present case.

One further matter remains to be addressed. Both the Second Circuit and the Seventh Circuit have observed in dicta that, although prejudice in a criminal prosecution is ordinarily a prerequisite for a judicial dismissal of an indictment as a remedy for government misconduct, the same drastic relief may be appropriate even in the absence of prejudice (presumably as an exercise of "supervisory" power) if the court finds "a pattern of demonstrated and longstanding widespread or continuous official misconduct." *United States* v. *Broward*, *supra*, 594 F.2d at 351. See also *United States* v. *Fields*, *supra*, 592 F.2d at 647–648; *United States* v. *Stanford*, *supra*, 589 F.2d at 299–300. Assuming for the sake of argument that dismissal of criminal indictments would be a proper judicial sanction in such circumstances, the court of appeals' action in the present case is still unjustifiable. Neither the

court below nor respondent has suggested that the DEA agents' behavior in visiting respondent outside the presence of her attorney is anything but an isolated instance of misconduct by individual law enforcement officers. *Commonwealth* v. *Manning*, *supra*, is apparently the only other reported case involving an effort by DEA agents to persuade a criminal defendant to cooperate with the government and obtain different counsel. The relevant events in *Manning* occurred four years before those in the present case, in a completely different location. Different agents were involved. In no sense do the actions of the agents in *Manning* and this case represent DEA policy or standard operating procedure.

On the contrary, at the time of the DEA agents' investigation in this case, Paragraph II(C)(2) of the DEA Domestic Operations Guidelines required that the approval of the appropriate prosecutor be obtained before any DEA agent could seek the cooperation of a defendant-informant. That requirement remains in effect today. On September 11, 1979, in response to the decision below, the DEA Chief Counsel's office issued a legal comment describing the facts of the case and the Third Circuit's ruling and concluding with the following instruction:

> *UNDER NO CIRCUMSTANCES, REGARDLESS OF WHETHER THE DEFENDANT HAS RETAINED COUNSEL, SHALL ANY DEA AGENT ATTEMPT TO CONTACT, OR CONTACT A POTENTIAL DEFENDANT-INFORMANT WITHOUT THE PRIOR, EXPRESS APPROVAL OF THE UNITED STATES ATTORNEY HANDLING THE CASE.*

In addition, on June 30, 1980, the Deputy Attorney General responded to an inquiry from Representative Don Edwards, Chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, regarding the conduct of agents of the Federal Bureau of Investigation in interviewing an incarcerated defendant in the absence of his attorney in *United States* v. *Glover, supra,* 596 F.2d at 859–864. In his letter, which is reprinted in full as an appendix to this brief, the Deputy Attorney General emphasized that "the facts of the *Glover* case are most unusual and do not typify the kinds of contacts between agents and represented defendants that we regard as proper." The Deputy Attorney General stated that "[a]s a matter of general practice, * * * government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney." The letter then identified three illustrative situations that together help to demonstrate why an absolute rule flatly prohibiting all such conversations would be undesirable. These are: (i) when a represented defendant seeks out the agent or prosecutor and insists on communicating without the knowledge of his attorney; (ii) when the represented defendant continues to be engaged in criminal conduct other than that for which he is under indictment; and (iii) when the government is seeking information critical to the safety of life or limb. The Deputy Attorney General assured Representative Edwards that, in the event of extenuating circumstances other than those listed above, representatives of the Department of Justice will be permitted to interview a represented defendant without notifying

counsel only after obtaining the specific authorization of a United States Attorney or other appropriate Department official. On August 11, 1980, the Director of the FBI circulated to all Bureau offices a policy directive incorporating the substance of the Deputy Attorney General's letter.

Particularly in light of these supervisory efforts within the Executive Branch to prevent the recurrence of the kind of misconduct involved here, there is no justification for dismissing the indictment against respondent as a means of deterring "a pattern of demonstrated and longstanding widespread or continuous official misconduct."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL

June 30, 1980

The Deputy Attorney General
Washington, D.C. 20530

Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Your letter of November 20, 1979, to the Attorney General regarding the *Glover* case has been brought to my attention. I apologize for the delay in following up our interim response.

As you note, the problem of investigating and interviewing indicted defendants recurs from time to time and often poses difficult ethical and legal questions. Fortunately, however, the facts of the *Glover* case are most unusual and do not typify the kinds of contacts between agents and represented defendants that we regard as proper.

For the last several months the Department has been exploring the issues raised by direct communications between government officials and represented defendants. Under established case law, the Sixth Amendment right to the advice and presence of counsel can be waived by a represented defendant even

outside the presence of counsel. After exhaustive research the Department's Office of Legal Counsel has also determined that interviews by the goverment with represented defendants conducted without prior notice to counsel are permissible under the American Bar Association's disciplinary rules where the interviews are necessary to the performance of the Department's statutory duty to prosecute offenses against the United States. Nevertheless, we recognize that such interviews raise difficult policy questions: the Department of Justice's obligation to conduct criminal investigations must be balanced against the important interest in fostering effective attorney-client relationships.

We expect in the reasonably near future to promulgate new policy in this area to govern the conduct of the Department's prosecutors and investigative agents, including agents in the Federal Bureau of Investigation and the Drug Enforcement Administration. Although the policy is still under review we are able to provide you with a brief outline of our likely approach.

As a matter of general practice, we believe that government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney. We believe this policy is important in order to promote the effectiveness of the attorney-client relationship between a defendant and his counsel. Prosecutors and agents have been, and will continue to be, sensitized to this general principle.

There will be, however, a number of situations in which interview of a defendant without the knowledge or consent of his counsel may be appropriate. First, there are occasions when a represented defendant seeks out the agent or prosecutor and insists on communicating without the knowledge of his attorney. Often such contacts are initiated when the defendant claims that his life or family will be in physical jeopardy if his counsel—who may represent others in the alleged criminal enterprise—were aware of the nature of the communications which the defendant wishes to make to the government. In these circumstances, the defendant should be advised of his right to retain separate counsel and advised that the government is willing to aid him in seeking confidential court appointment of separate counsel. Once this advice is given, we believe that communications can proceed so long as there is a clear, knowing and intelligent waiver of the right to a counsel, preferably in writing.

A second exception to the general rule against direct contacts with a defendant arises where the represented defendant may continue to be engaged in criminal conduct other than that for which he is under indictment. In this type of situation, the government may employ undercover agents or operatives to communicate with the defendant in an effort to foil his plans and to prosecute him for the separate offenses. Plainly, the fact that the defendant has been indicted on one charge cannot serve to immunize him from the use of ordinary investigative techniques with respect to other criminal activities in which he may be involved. In such a situation, it is possible—although not

the design of the government—that communications can arise relating to the pending offense. Consistent with the Supreme Court's recent ruling in *United States* v. *Henry*, No. 79-121 (June 16, 1980), we instruct our operatives not to deliberately elicit from such defendants statements concerning the pending charges, and we caution them to do their best to minimize any such communications that may nevertheless occur. We also take other precautions to avoid potential problems in this area, although these steps are not always successful. In this type of situation, it is clearly not feasible to seek to retain or appoint separate counsel.

Third, there may be circumstances where the government is seeking information critical to the safety of life or limb—for example, the location of a kidnapping victim—from a represented defendant and there is substantial reason to believe that the presence of counsel will delay or impede the flow of the needed information. This should be a rare case and should be undertaken only when those in supervisory positions are convinced there are no feasible alternatives.

We do not suggest that the foregoing represents an exhaustive catalog of the situations which may arise where there will have to be contacts between government representatives and a represented defendant without the knowledge or consent of his attorney. On the contrary, we believe they illustrate some of the reasons that it is impossible to approach this area with absolute hard and fast rules, and they underscore the need to apply general rules flexibly to meet unforeseen contingencies. Accordingly, in addition to the forego-

ing, our policy will permit Department representatives to conduct interviews of a represented defendant without notifying counsel on the basis of extenuating circumstances (such as defense counsel's involvement in the criminal offense or other serious conflict of interest) if but only if a United States Attorney or other appropriate Department of Justice official specifically authorizes the contact.

In all cases, we will continue, in accordance with constitutional requirements, to advise the individual of his *Miranda* rights. If the individual has already retained counsel, we will continue to inform the individual of his right to have that lawyer or another lawyer present.

In conclusion, we neither endorse nor condone situations, such as those alleged in *Glover*, where a government agent misrepresents the position of a defendant's counsel or disregards an explicit ruling by a court. We emphasize again, however, that this scenario is most atypical; and we will do our best to prevent such occurrences from arising in the future.

We appreciate your interest in this matter. Please do not hesitate to contact us if there is any further information we can provide.

Sincerely,

/s/ CHARLES B. RENFREW
Charles B. Renfrew

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